Supreme Court, U.S.
FILED
JUL 6 1999
CLERK

No. 98-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

J.S.G. BOGGS,

Petitioner,

v.

ROBERT E. RUBIN, BRIAN L. STAFFORD, and JANET RENO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, THE ART INSTITUTE OF CHICAGO, AND THE MUSEUM OF MODERN ART IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record for
Amici Curiae

Of Counsel:

LANDIS C. BEST
CAHILL GORDON & REINDEL
(a partnership including a professional corporation)
New York, New York

July 1, 1999

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A STRONG TRADITION OF TROMPE L'OEIL WORKS OF ART INVOLVING CURRENCY	4
II. TO INCINERATE EXPRESSIVE WORKS OF ARTISTS WITHOUT PROCEDURAL SAFEGUARDS VIOLATES THE FIRST AMENDMENT	9
CONCLUSION	17
APPENDIX	

TABLE OF AUTHORITIES

Cases PAGE

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) . 10n, 12

Boggs v. *Bowron*, 842 F. Supp. 542 (1993), *aff'd*, 67 F.3d 972 (1995), *cert. denied*, 517 U.S. 1134 (1996) 2n, 13n

Boggs v. *Merletti*, 987 F. Supp. 1 (1997) 13n

Boggs v. *Rubin*, 161 F.3d 37 (1998) 5n, 14, 16, 16n

Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) 12

Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) 2, 4, 9, 11-15, 17

Freedman v. *Maryland*, 380 U.S. 51 (1965) 12, 13n

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) . 12

Heller v. *New York*, 413 U.S. 483 (1973) 11, 13n

Hurley v. *Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) 15

Kaplan v. *California*, 413 U.S. 115 (1973) 15

Marcus v. *Search Warrants*, 367 U.S. 717 (1961) 4, 9-10, 9n, 11-15

Maryland v. *Macon*, 472 U.S. 463 (1985) 12

Miller v. *California*, 413 U.S. 15 (1973) 15

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 17

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 12, 17

PAGE

Organization for a Better Austin v. *Keefe*,
402 U.S. 415 (1971) 12

Quantity of Copies of Books v. *Kansas*,
378 U.S. 205 (1964) 9-14

Roaden v. *Kentucky*, 413 U.S. 496 (1973) 9, 12

Schad v. *Mount Ephraim*, 452 U.S. 61 (1981) 15

Southeastern Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1975) 9n-10n

United States v. *Thirty-Seven Photographs*,
402 U.S. 363 (1971) 13n

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989)... 15

Constitutional Provisions

U.S. Const. amend. I .....*passim*

Rules

U.S. Sup. Ct. R. 10(c)..... 2

U.S. Sup. Ct. R. 37(2)(a)..... 1

Statutes

Criminal Code

18 U.S.C. § 474 (1994 & Supp. III 1997)..... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1785

J.S.G. BOGGS,

Petitioner,

v.

ROBERT E. RUBIN, BRIAN L. STAFFORD, and JANET RENO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICI CURIAE OF THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, THE ART INSTITUTE OF CHICAGO, AND THE MUSEUM OF MODERN ART IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Andy Warhol Foundation for the Visual Arts, the Art Institute of Chicago, and the Museum of Modern Art, as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner J.S.G. Boggs. Pursuant to Rule 37(2)(a) of the rules of this Court, *amici* have obtained and filed the written consents of the parties to the filing of this brief.

The Petitioner, J.S.G. Boggs, is an academic and artist whose artwork focuses on money and its role in society. He is by no means the first artist to do so. Many artists, both past and present, have created trompe l'oeil pictures of currency.[1] Examples of their works are annexed to this brief.

Unlike his artistic peers, however, Boggs' artwork has been seized by the United States Government as contraband. This was done without any of the procedural protections required by the First Amendment with respect to expressive materials and affirmed in an opinion of the Court of Appeals for the District of Columbia which concluded that works that are suspected of being obscene are entitled to a level of First Amendment protection that is higher than that afforded to art works said to constitute contraband. The result below is a frontal assault on well-established First Amendment rights, and the questions presented by the certiorari petition are of profound constitutional importance well-deserving this Court's review. Supreme Court Rule 10(c); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 53 (1989) (granting certiorari petition because of "substantial constitutional issues raised by the pretrial seizure").

INTEREST OF AMICI CURIAE

Amici are art institutions with a strong commitment to supporting creative expression and to assuring that such expression is fully protected under the First Amendment to the United States Constitution.

The **Andy Warhol Foundation for the Visual Arts** is the principal beneficiary of the estate of Andy Warhol, who is recognized as one of the most important and influential artists

---

[1] "Trompe l'oeil" is a French expression that means "fool the eye." *Boggs* v. *Bowron*, 842 F. Supp. 542, 544 n.7 (1993) (reprinted in joint appendix to the United States Court of Appeals for the District of Columbia Circuit in *Boggs* v. *Rubin*, No. 97-5313, at A-56, n.7) (hereinafter "jt. app. at A-__").

of the 20th Century. Since 1990, the Foundation has curated, catalogued, and provided art-professional storage for over 100,000 paintings, drawings, prints, and photographs, as well as video and film material created by Warhol. Through financial grants supporting contemporary art, as well as its promotional and organizational efforts, the Foundation is a leading organization for the advancement of the visual arts.

The **Art Institute of Chicago** is an Illinois not-for-profit corporation founded in 1879. One of the country's oldest artistic institutions, it is engaged in the maintenance of Schools of art and design, the formation of exhibitions and collections of objects of art, and the cultivation and extension of the arts to the general public through its City of Chicago Grant Park campus.

The **Museum of Modern Art**, dedicated to being the foremost modern art museum in the world, was founded in 1929 as an educational institution. The museum establishes, preserves, and documents a permanent collection of the highest order that reflects the vitality, complexity, and unfolding patterns of modern and contemporary art; presents exhibitions and educational programs of unparalleled significance; sustains a library, archives, and conservation laboratory that are recognized as international centers of research; and supports scholarships and publications of preeminent intellectual merit.

SUMMARY OF ARGUMENT

Given its prominent role in society, politics, and culture through the ages, it is not surprising that money has often been the focus of artistic expression. Boggs' artwork about currency is a contemporary manifestation of a long and well-established tradition of trompe l'oeil artwork that has existed in this country for over 100 years. Examples of that work are annexed to this brief.

This important area of First Amendment-protected artistic expression is gravely threatened by the lower courts' sanctioning of the Government's wholesale seizure of Boggs' artwork without *any* of the procedural protections afforded expressive materials as set forth by this Court's precedents. *See, e.g., Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). Here, there is no question that "an effective restraint— indeed the most effective restraint possible—was imposed" (*Marcus*, 367 U.S. at 736) upon Boggs prior to any hearing on the critical question of whether his artwork met the necessarily subjective criteria for contraband set forth by the counterfeiting statutes. This conduct is at odds with deeply rooted First Amendment principles.

ARGUMENT

I. THERE IS A STRONG TRADITION OF TROMPE L'OEIL WORKS OF ART INVOLVING CURRENCY

Boggs' artwork—actual-sized trompe l'oeil images of currency—builds upon a long line of artists who have also focused on money as the subject of their art. Indeed, there is an entire school of trompe l'oeil currency painting that first emerged in the 19th century.

Bruce W. Chambers, an art historian who holds a Ph.D. in Art History from the University of Pennsylvania, has written extensively about the 19th century school of trompe l'oeil painting. Chambers submitted an affidavit in the district court in which he explained the artistic roots of Boggs' work:

> "Practiced by important artists such as William Michael Harnett, John Haberle, John F. Peto, Nicholas A. Brooks, Victor Dubreuil, and Otis Kaye . . . this school of painting employed depictions of currency as a vehicle for commenting on social and political issues of the day,

> many of which focused on monetary policy and paper money itself. The work of J.S.G. Boggs is a direct descendant of these earlier works, and a complete appreciation of his art is possible only if one understands the political, cultural, and artistic tradition in which his work is firmly rooted."

(Chambers Aff. ¶4; jt. app. at A-137)[2] Chambers then explained the historical development of paper money and a national banking system after the Civil War, all of which led to "the rise of Populism, the Free Silver Movement, and the acrimonious presidential campaign in 1896, best exemplified by William Jennings Bryan's famous 'Cross of Gold' speech assailing monometallism and the special interests who supported it." (Chambers Aff. ¶5; jt. app. at A-138-39).

Chambers further explained:

> "In the context of this fundamental division in American society over conceptions of democracy, wealth, commerce, banking, and the proper relation of the federal government to each, artists such as Harnett and Dubreuil seized upon currency as the quintessential emblem of the social and political landscape. These artists—themselves squarely within the dual European traditions of money painting (dating to the Renaissance) and still lifes—communicated their ideas by means of

---

[2] In her dissenting opinion, Judge Rogers noted the evidence in the record supporting Boggs' artistic credentials: "Our obligation [to review the Boggs bills] is particularly clear in light of declarations from an art professor and a museum curator attesting to the artistic integrity of Boggs' work. A third declaration, from a distinguished art historian [Chambers], notes the historical pedigree of Boggs' decision to create images of money, and reminds us that since as early as 1886, the sensibilities of American artists and anti-counterfeiting authorities have collided." *Boggs* v. *Rubin*, 161 F.3d 37, 43 n.3 (1998) (Rogers, J., concurring in part and dissenting in part), reprinted in appendix to certiorari petition at 12a-13a (hereinafter "cert. petn. at __").

> elaborate visual puns and allusive inclusions. . . ." (Chambers Aff. ¶ 6; jt. app. at A-139)
>
> "Significantly, all of these artists played upon the twinned concepts of value and worthlessness not only by painting particular types of notes, but also by frequently incorporating into their work subtle changes to distinguish their 'bills' from genuine currency. . . ." (Chambers Aff. ¶ 7; *Id.*)

Chambers examined Boggs' artwork as compared to this tradition of trompe l'oeil currency paintings. He stated as follows:

> "The work Boggs undertakes lies in direct line with that of Harnett, Haberle, Dubreuil, and others. Like his predecessors, Boggs appropriates one of the most common tokens of every citizen's daily life—paper money—and draws upon the item's symbolism even as he comments on money itself and the social function it serves. Also like his forebears, Boggs incorporates significant variations into his bills, variations that serve not only to reinforce that the work is *not* that of a deceitful copyist (however skillful), but also to communicate additional ideas (and provoke thoughtful reaction) about the interrelationships among money, ordinary people, art, value, and governmental power. . . ." (Chambers Aff. ¶ 10; jt. app. at A-141)

Chambers also explained that Boggs builds upon the work of his predecessors by adding a new dimension to the trompe l'oeil experience:

> "Boggs, however, takes the dialogue with his viewer *qua* consumer one step beyond the work of Harnett *et al.* In approaching ordinary people to propose the barter of his art for goods or services, Boggs engages in an active dialogue with his audience, one individual at a time. The discussions that result—focusing on art as a commodity,

> on relative (or communal) conceptions of value, and on the artist's inevitable dislocation of the item depicted from the original—represent a more externalized version of the mental processes experienced by the audiences of Dubreuil and Harnett." (Chambers Aff. ¶ 11; jt. app. at A-142)

Another expert witness, Roger Mayer—the Chair of the Department of Visual Arts at Brown University—used similar words to describe Boggs' artistic works and their contribution to society. Professor Mayer attested as follows:

> "Based upon this first-hand familiarity with Boggs and his work, I believe that his money paintings communicate important ideas. Boggs engages his audience with a special kind of wit and humor, as evidenced by the many distinctive puns and allusions embedded in his 'bills.' Having thus entered into a conversation with the audience, Boggs assists his audience in exploring ideas relating to art as a medium of exchange and to the core notion of what is 'real' as opposed to fake, inauthentic, or valueless. In so doing, Boggs straddles one of the great modern philosophical divides. On one hand is Heidegger (and indeed, all descendants of Platonic thought), who posits the existence of the absolutely authentic original—in effect, what other thinkers have referred to variously as the *Ding an sich* ("thing in itself") or the *noumenon* (the Platonic ideal, contrasted with the *phenomenon*, or specific instance of the Ideal). On the other side lie the post-modernists such as Baudrillard, Derrida, and Foucault who, like Immanuel Kant before them, reject the philosophical notion of an unassailable, objectively determinable Ideal." (Mayer Aff. ¶ 5; jt. app. at A-129-30)

Other contemporary artists, like Boggs, have continued the tradition of using trompe l'oeil images of money in their artwork. For example, Andy Warhol often depicted realistic

images of currency in his artwork, such as "Two Dollar Bill with Jefferson," and "Ten Dollar Bill." (*See* Appendix at A-11 and A-12) Warhol's works also included mass reproductions of images of currency, such as that seen in "Eighty Two-Dollar Bills." (*See* Appendix at A-15)

Collected in the Appendix is a compendium of works from artists through the ages who have created trompe l'oeil images of currency in their artwork. These artists include the following:

- William Michael Harnett
- John Haberle
- Thomas H. Hope
- Peter McCallion
- Nicholas A. Brooks
- Victor Dubreuil
- Otis Kaye
- Andy Warhol
- Robert Watts
- David Wojnarowicz

These artists' work ranges from technical studies of modern bills (*e.g.*, the works of Andy Warhol and Robert Watts at A-11 through A-17), to collages involving images of the front and back of bills (*e.g.*, David Wojnarowicz at A-18), to detailed depictions of 19th century bills (*e.g.*, the works of William Michael Harnett, Thomas H. Hope, and John Haberle at A-1 through A-4). The currency artwork from the 19th century includes Victor Dubreuil's "The Cross of Gold," which played upon the famous "Cross of Gold" speech by presidential candidate William Jennings Bryan in 1896. (*See* Appendix at A-7)

Thus, far from serving as some sort of pretextual mechanism to distribute contraband, Boggs' artwork follows and

builds upon the tradition of trompe l'oeil currency paintings that has existed in this country for over 100 years. The lower courts' countenance of the seizure of Boggs' artwork, without any of the protections afforded by the First Amendment, is a direct threat to artistic freedom protected by the First Amendment and is well-deserving of this Court's plenary review.

II. TO INCINERATE EXPRESSIVE WORKS OF ARTISTS WITHOUT PROCEDURAL SAFEGUARDS VIOLATES THE FIRST AMENDMENT

In a long line of cases, this Court has set forth special procedural protections that must be followed prior to the seizure of expressive materials presumptively protected by the First Amendment. *See, e.g., Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989).

In *Marcus*, this Court examined state procedures by which thousands of books, magazines and photographs were seized on the basis of their alleged obscenity. Among other things, the property owner was not afforded a hearing as to the alleged obscenity of the materials prior to issuance of the search warrants. 367 U.S. at 719-20. The Court held that the procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled," *id.* at 731, and in particular faulted that "there was no step in the procedure *before seizure* designed to focus searchingly on the question of obscenity." *Id.* at 732 (emphasis added).[3] In reaching its decision, the

[3] It is noteworthy that *Marcus*, like the instant case, addressed a procedural challenge. 367 U.S. at 723. Many cases setting forth important First Amendment protections have arisen in the context of procedural challenges. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975) (holding unconstitutional a city's licensing system and noting that "[i]nsistence on rigorous procedural safeguards under these

Court rejected the lower court's "assimilation of obscene literature to gambling paraphernalia or other contraband" (*id.* at 730) because of the First Amendment implications of the former:

> "[T]he use of these warrants [as compared to those involving, *e.g.*, "all intoxicating liquors"] implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . *The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .*' "

Id. at 731 (internal citation and footnote omitted) (emphasis added).

In *Quantity of Books*, this Court again condemned the procedures used in the mass seizure of books slated for destruction. The Court held:

> "[I]n not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient. What we said of the Missouri procedure also fits the Kansas procedure used to remove these books from circulation: '. . . there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the (sheriff) could lay (his) hands were physically removed . . . from the premises of the wholesale distributor.' "

378 U.S. at 211 (internal citations and footnote omitted). The Court rejected the argument that the procedural ills were cured

---

circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks' ") (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963)).

by a post-seizure hearing on the merits of the obscenity issue. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *Id.* at 213.

In *Heller* v. *New York*, 413 U.S. 483 (1973), the Court rejected the need for a pre-seizure adversarial hearing on the issue of obscenity where state officials seized a *single* copy of a film for the purposes of preserving it as evidence for trial. The Court distinguished this situation from that confronted in *Quantity of Books* and *Marcus*:

> "Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books.' We do not disturb this holding. *Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of A Quantity of Books and Marcus are fully met.*"

Heller, 413 U.S. at 491 (footnotes and internal citations omitted) (emphasis added).

This Court's teachings in *Marcus*, *Quantity of Books*, and *Heller* were reviewed and reiterated in *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989). In striking down the seizure of thousands of books and films under the auspices of a state RICO statute, the Court summarized its prior holdings as follows:

> "[W]e concluded [in *Heller*] that until there was a 'judicial determination of the obscenity issue in an adversary proceeding,' exhibition of a film could not be restrained by seizing all the available copies of it. The same is obviously true for books or *any other expressive mate-*

> *rial.* While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing."
>
> "Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), *it is otherwise when materials presumptively protected by the First Amendment are involved.*"

Id. at 63 (internal citations omitted) (emphasis added). *See also Freedman* v. *Maryland*, 380 U.S. 51 (1965) (striking down motion picture censorship statute as unconstitutional prior restraint lacking necessary procedural safeguards); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990) (striking down content-neutral licensing system for failing to provide procedural protections).

The strict procedural requirements with regard to the seizure of potential First Amendment-protected material is rooted in the concern that this Court has consistently expressed regarding prior restraints. *Fort Wayne Books*, 489 U.S. at 63-64 (citing *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)); *Quantity of Books*, 378 U.S. at 213; *Roaden*, 413 U.S. at 504-05; *Marcus*, 367 U.S. at 736. " 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' " *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70). *See also FW/PBS*, 493 U.S. at 225; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman*, 380 U.S. at 57.

The instant case is squarely governed by *Fort Wayne Books*, *Quantity of Books*, and *Marcus*. There is no dispute that

Boggs' artwork is expressive material protected by the First Amendment; indeed that conclusion is law of the case.[4]

The seizures by the government of Boggs' artwork, however, failed to comply with the well-established procedural requirements mandated by the First and Fifth Amendments set forth above. As to the Pittsburg seizure, the Secret Service seized over 1,000 items from Boggs' home and studio prior to a publicized exhibition of Boggs' work in the Pittsburg area. This massive search and seizure is similar to those that were disapproved by this Court in *Fort Wayne Books*, *Quantity of Books*, and *Marcus*. As in those cases, expressive materials presumptively protected by the First Amendment were restrained from publication without *any* pre-seizure hearing to determine whether the criteria for their seizure had been met.[5] As it now stands, large quantities of artwork from a renowned artist have been seized by the government and stand on the verge of effectively being torched.

---

[4] "In *Boggs* v. *Bowron*, this court held that the Boggs Bills were expressive materials, presumptively protected by the First Amendment. *Boggs* v. *Bowron*, 842 F. Supp. at 551. That holding is 'law of the case' for this analysis, and this court will proceed under the presumption that 'Mr. Boggs has a First Amendment right to create illustrations of United States currency absent constitutionally permissible overriding considerations.' *Id.*" *Boggs* v. *Merletti*, 987 F. Supp. 1, 6 n.2 (1997), reprinted in cert. petn. at 23a.

[5] The seizure here cannot be compared to the situation where only one sample was seized so as to preserve evidence for trial as in *Heller*. Indeed, Boggs was never prosecuted for violating the counterfeiting statues. In any event, the procedural requirements for even a *Heller*-type of seizure were not met. *Heller* requires a *prompt* judicial determination in an adversary proceeding after the seizure to determine if the seizure was proper. *Heller*, 413 U.S. at 493. The Court stated in no uncertain terms: "By 'prompt,' we mean the shortest period 'compatible with sound judicial resolution.' " *Id.* at n. 9 (citing *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman*, 380 U.S. at 58-59). The government clearly failed to provide Boggs with a prompt post-seizure hearing as to whether his artwork, seized in March 1991 and December 1992, fell within the reach of the counterfeiting statutes.

The court of appeals below did not question the procedural requirements for seizures of expressive material set forth by this Court in *Marcus*, *Quantity of Books*, and *Fort Wayne Books*. Conceding that Boggs had been afforded *none* of the procedural safeguards established by these cases, the court of appeals ruled that the entire line of authority was inapplicable to Boggs because his case involved an issue of potential counterfeiting, whereas the other cases involved the issue of potential obscenity. In the court's words:

> "The cases Boggs cites are all obscenity cases, where *significant judgment* was needed to determine if the seized materials violated community standards. . . . The important First Amendment concerns advanced by the Supreme Court in the obscenity cases are not present to the same extent here. Boggs' artwork is designed to look like money. While *some judgment* is needed on the part of officers charged with enforcing the counterfeiting statutes, the inquiry is not inherently content-based and thus poses little risk of acting as a prior restraint on expressive materials."

Boggs, 161 F.3d at 41, reprinted in cert. petn. at 7a (emphasis added).

The lower court's rationale for sidestepping this Court's precedents cannot withstand scrutiny. While it is true that the rules for procedural safeguards prior to seizing expressive material were announced in the context of obscenity cases, the Court's rationale is not so narrow. Rather, both the language and the reasoning supporting the Court's decisions (*i.e.*, the suspicion with which this Court views prior restraints) broadly encompasses all situations where expressive materials protected by the First Amendment could be taken out of circulation unilaterally. *See, e.g.*, *Fort Wayne Books*, 489 U.S. at 63 ("while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First

Amendment are involved"); *Marcus*, 367 U.S. at 724-29 (noting that "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new" and tracing the historical abuses of that power to suppress wide range of expressive activity). Clearly such situations include artwork by a renowned if somewhat controversial artist whose work has been accused of looking too much like real United States currency.

Moreover, the lower court's treatment of potential obscenity as entitled to greater protection than artwork about currency turns the First Amendment on its head. Obscene materials are, of course, entitled to no First Amendment protection and serious works of art cannot, by definition, be deemed obscene. *See Miller* v. *California*, 413 U.S. 15, 24 (1973). In fact, artistic works are fully protected by the First Amendment. *See, e.g., Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) (examples of painting, music and poetry are "unquestionably shielded"); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989) ("[m]usic, as a form of expression and communication, is protected under the First Amendment"); *Schad* v. *Mount Ephraim*, 452 U.S. 61, 65 (1981) ("[e]ntertainment, as well as political and ideological speech, is protected"); *Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, and engravings . . . have First Amendment protection").

It is a strange view of the First Amendment that would afford artistic expression involving money *less* protection than that afforded in the obscenity context. Under the lower court's rationale, had Boggs decorated his bills with arguably obscene images, he would have received the full benefit of First Amendment procedural safeguards; without a sexual theme, however, he receives none.

The court of appeals' own decision reveals the bankruptcy of its analysis. The court attempted to distinguish potential

obscenity from potential counterfeiting on the grounds that the former requires "significant judgment . . . to determine if the seized materials violated community standards," whereas the latter requires only "some judgment." This is the quintessential slippery slope that leads to a chilling of expression anathema to the First Amendment. The distinction between "significant judgment" and "some judgment" may be debated, but the fact remains that *judgment* must be exercised to determine whether any particular piece of artwork satisfies the statutory criteria for counterfeit currency.[6]

For example, the criteria for counterfeit currency cited by the court below includes whether the artwork is "in the likeness and similitude of genuine currency." *Boggs*, 161 F.3d at 42, reprinted in cert. petn at 9a. *See also* 18 U.S.C. §§ 474(a). That there is much room for judgment in determining whether this element has been met is seen by the dissenting opinion's expression of incredulity that the district court found that "a sponge and a bow tie are in the 'similitude' of actual currency . . . ." *Boggs*, 161 F.3d at 43, reprinted in cert. petn. at 13a (Rogers, J., concurring in part and dissenting in part). *See also id.* (18 U.S.C. § 474 "appears to incorporate a substantial degree of subjectivity"). Indeed, one need only look at the artistic works collected in the Appendix to wonder if they, too, would meet a secret service agent's view of the "similitude" requirement to be branded "counterfeit" under the statutes and subject to seizure and destruction as contraband.

Because a reviewer's subjective judgment must be summoned to determine whether a particular piece of artwork meets the "similitude" and "likeness" requirements for counterfeit bills, at a minimum three conclusions follow: (1) the

---

[6] As noted in the dissenting opinion: "Labeling a counterfeit bill 'art' will not save it from the Secret Service's incinerator, but at some point, an artwork's loose resemblance to currency will not strip it of First Amendment protection." *Boggs*, 161 F.3d at 43 n.2 (internal citation omitted) (Rogers, J., concurring in part and dissenting in part), reprinted in cert. petn. at 12a.

situation raises all of the problems associated with any system of prior restraint, *see, e.g., New York Times Co.* v. *United States*, 403 U.S. at 714; (2) a pre-seizure adversarial hearing must be held to determine whether the counterfeiting criteria has been met in line with the *Fort Wayne Books* line of cases; and (3) any appellate review of a decision that a particular piece of artwork is "counterfeit" must be upon a full review of the record, including most importantly the work itself. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-85 (1964) (an appellate court has an obligation to " 'make an independent examination of the whole record' " in cases implicating the First Amendment) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 1, 1999

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record for
Amici Curiae

Of Counsel:

LANDIS C. BEST
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
New York, New York

APPENDIX

APPENDIX
TABLE OF CONTENTS

Artist and Work PAGE

William Michael Harnett, **Five Dollar Bill**. 1877, Oil on canvas, 8 x 12 inches. A-1

Thomas H. Hope, **United States Dollar Note**. After 1883, Oil on canvas, 7 3/4 x 11 5/8 inches. Arthur J. Phelan, Jr. A-2

John Haberle, **One Dollar Bill**. 1890, Oil on canvas, 8 x 10 inches. Berry-Hill Galleries. A-3

John Haberle, **U.S.A.** Ca. 1889, Oil on canvas, 8 1/2 x 12 inches. Collection of Jo Ann and Julian Ganz, Jr. A-4

Nicholas A. Brooks, **Ten Dollar Bill**. After 1893, Oil on panel, 5 1/4 x 9 1/2 inches. Berry-Hill Galleries A-5

Victor Dubreuil, **Ten Dollar Bills**. After 1893, Oil on canvas, 10 x 12 inches. Private collection A-6

Victor Dubreuil, **The Cross of Gold**. Ca. 1896, Oil on canvas, 14 x 12 inches. Private collection. A-7

Peter McCallion, **One Silver Dollar Bill** (recto). Ca. 1896, Oil on canvas, 6 x 9 1/4 inches. The Shearson Lehman Hutton Collection A-8

Otis Kaye, **Trompe L'Oeil for Bessie Hoffman**. After 1922, Oil on board, 21 x 12 3/4 inches, signed and inscribed falsely (left center): N.A. Brooks/ N.Y. Private collection. A-9

PAGE

Otis Kaye, **Ten Dollar Bill** (verso). 1950, Black ink and pencil on paper, 3 1/2 x 7 1/4 inches. Berry-Hill Galleries..... A-10

Andy Warhol, **Two-Dollar Bill with Jefferson**. 1962, Pencil on paper, 18 x 24 inches. Collection Louise Ferrari, Houston..... A-11

Andy Warhol, **Ten-Dollar Bill**. 1962, Pencil and watercolor on paper, 10 x 23 inches. Private collection, New York A-12

Andy Warhol, **One-Dollar Bill with Washington**. 1962, Pencil, 45 x 60 cm, Hessisches Landesmuseum, Darmstadt, Stroeher Collection..... A-13

Andy Warhol, **Eight One Dollar Bills**. 1962, Silkscreen ink on paper, 33 7/8 x 24 1/2 inches. Oeffentliche Kunstsammlung Basel, Kupferstichkabinett. Gift of a patron..... A-14

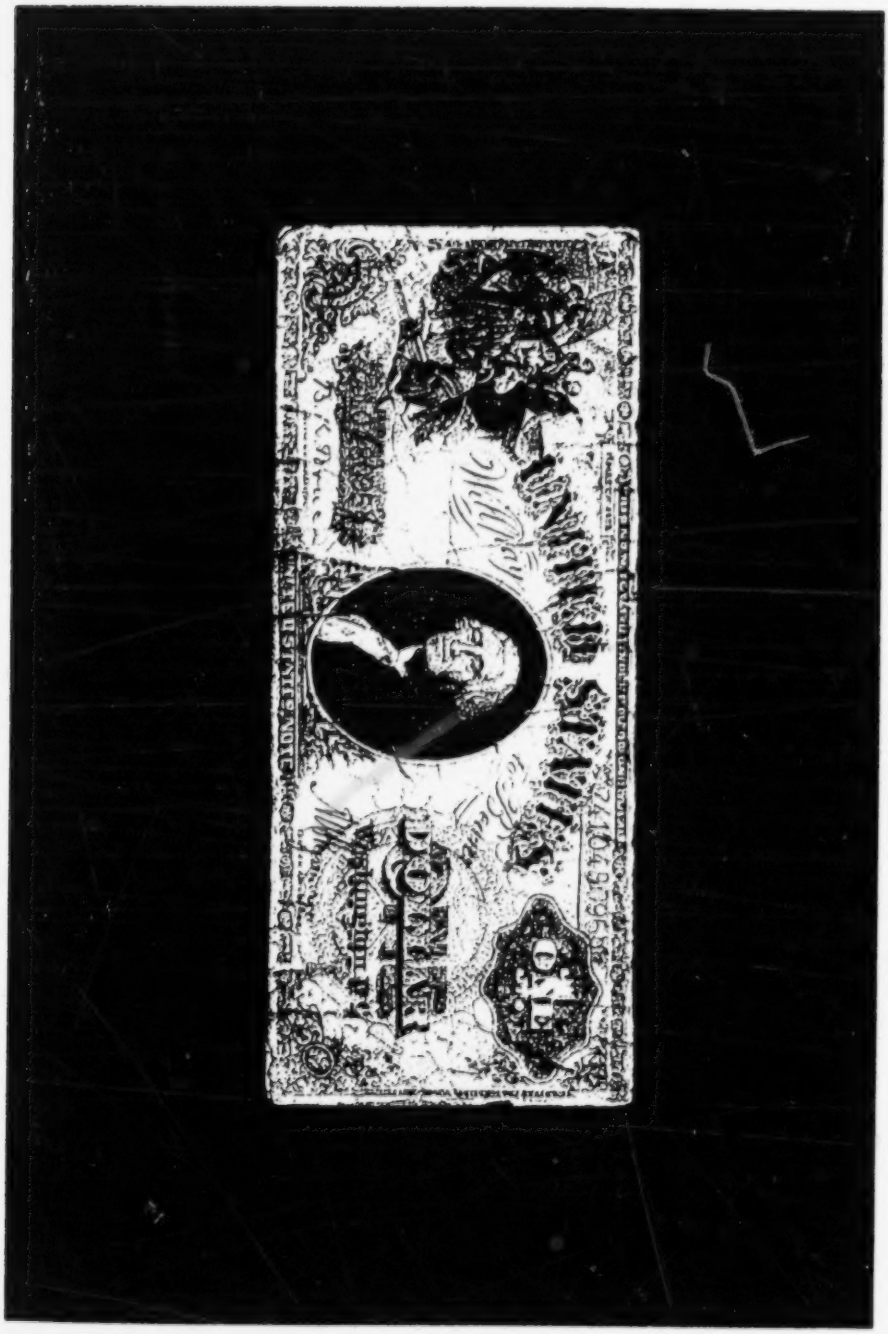
Andy Warhol, **Eighty Two-Dollar Bills**. Front and Rear. 1962, Silkscreen ink on canvas, 6 feet, 11 inches x 38 inches. Museum Ludwig, Cologne..... A-15

Andy Warhol, **Many One-Dollar Bills**. 1962, Silkscreen ink on canvas, 6 feet x 54 inches. The Estate of Myron Orlofsky A-16

Robert Watts, **Dollar Bill**. 1961-62. One example: drypoint on paper, 10 x 7 1/2 inches; five examples: offset on paper (from an edition of unknown size), 2 9/16 x 6 1/16 inches. Larry Miller and Sara Seagull..... A-17

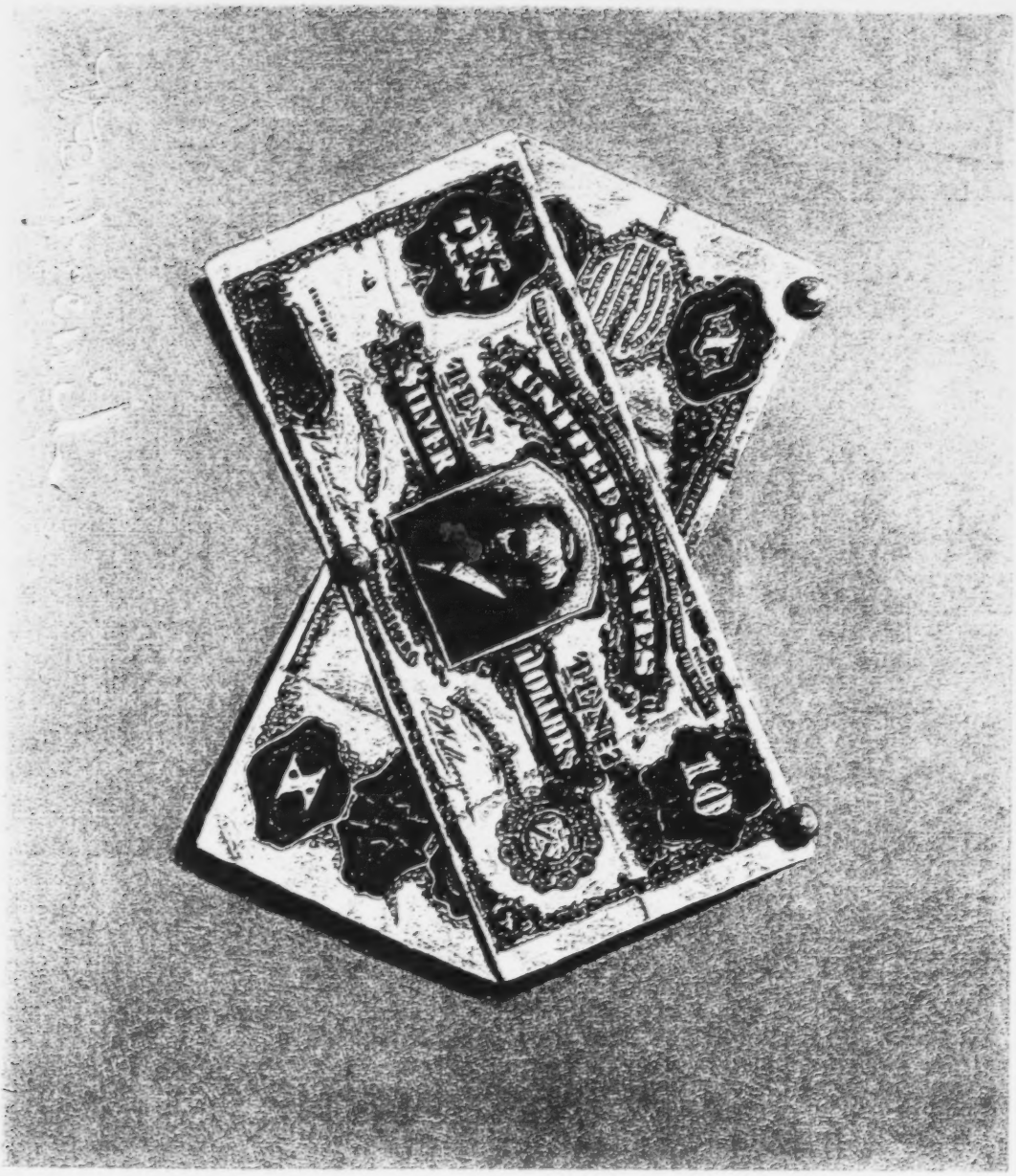
PAGE

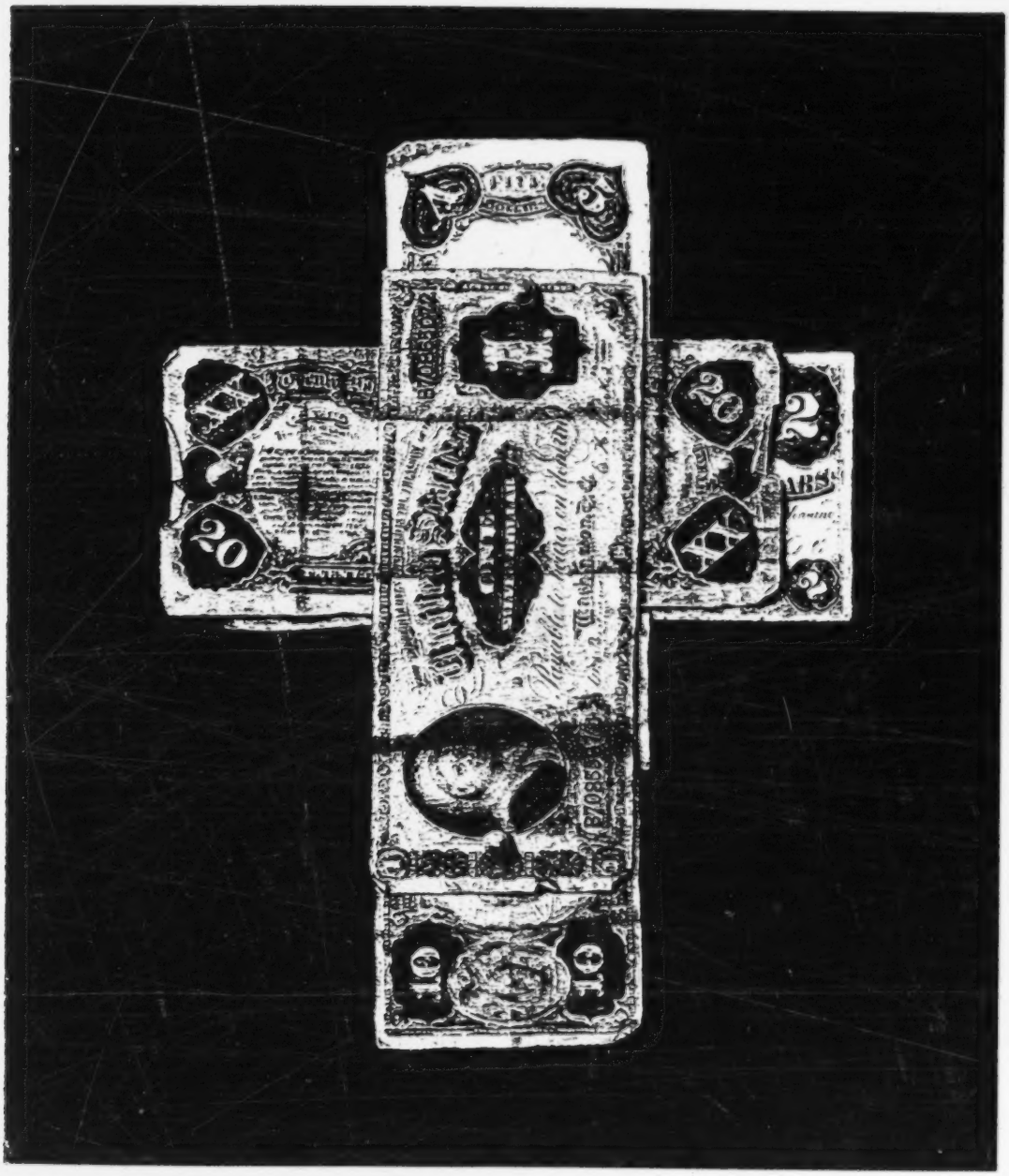
David Wojnarowicz, **Fear of Evolution**. 1988-89,
Black-and-white photographs, acrylic, string, and
collage on masonite, 42 1/2 x 36 1/2 inches.
Collection of Dr. Robert Friedman..... A-18

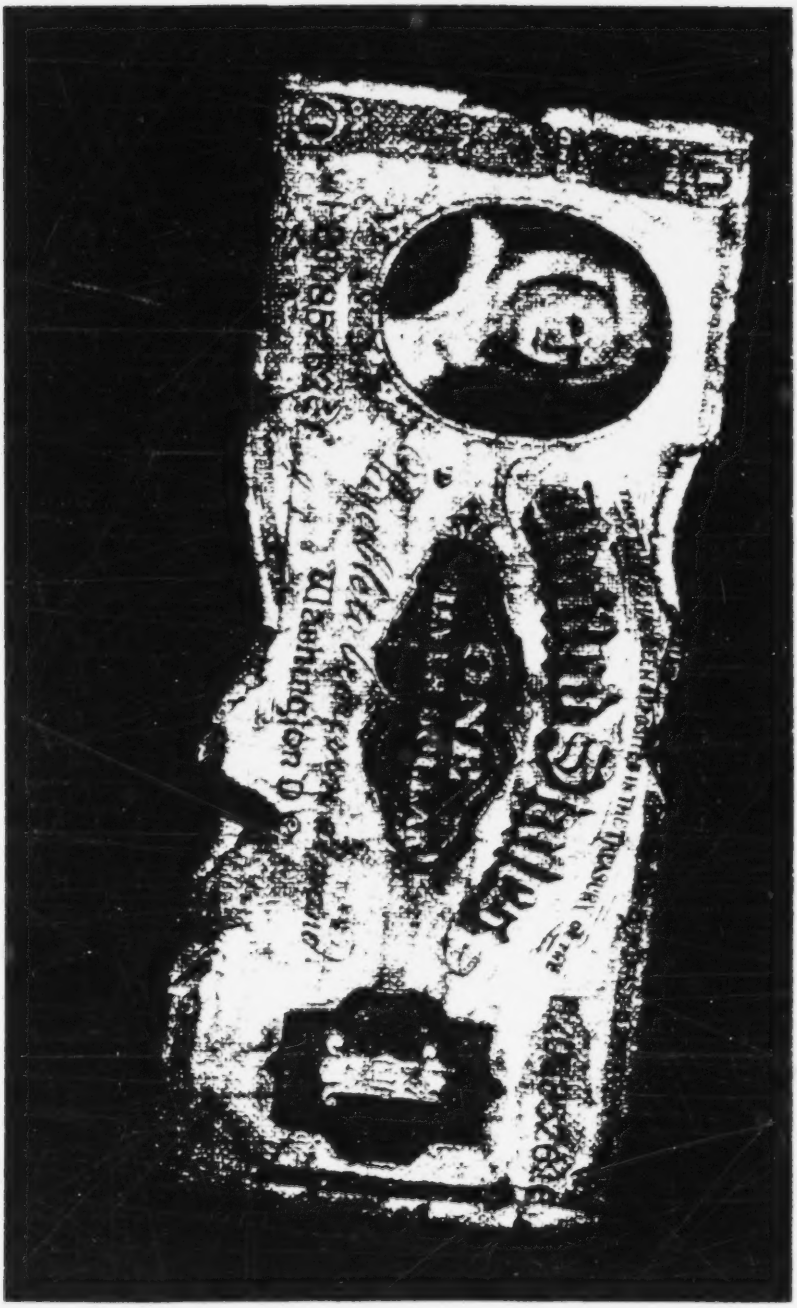


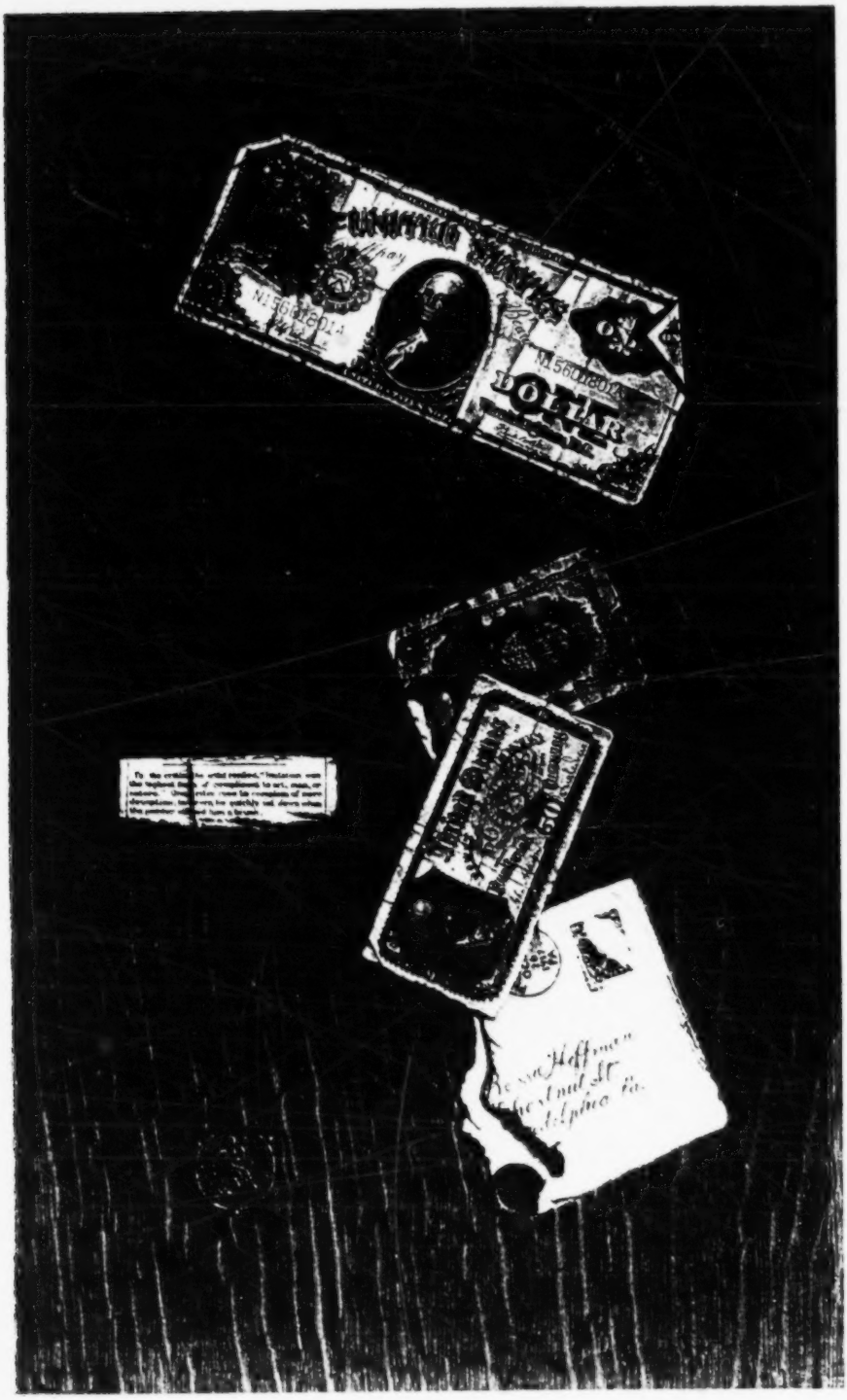
ONE

TEN
A156259
UNITED STATES
10
TEN DOLLARS
WASHINGTON, D.C.
A156259


SILVER
1934
UNITED STATES
TEN
DOLLARS
10






DOLLAR

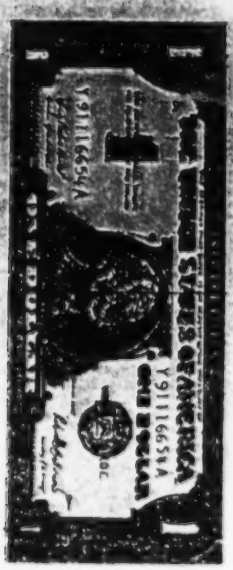
TEN DOLLARS
THE UNITED STATES OF AMERICA
TEN
TEN
TEN
TEN

THE UNITED STATES OF AMERICA
TWO DOLLARS
WASHINGTON D.C.

THE UNITED STATES OF AMERICA
B 45728474 C
WASHINGTON, D.C.
TEN DOLLARS

SILVER CERTIFICATE
THE UNITED STATES OF AMERICA
F 82575830 A
ONE DOLLAR
SERIES 1957 A
ONE DOLLAR

G 10169344 A
G10169344A


THE UNITED STATES OF AMERICA
ONE DOLLAR